tionaries and decisions so hold. (*Winkler* v. *Phil. R. R. Co.*, 4 Penn. (Del.) 387, 53 Atl. Rep. 90; *Fleming* v. *Southern Ry. Co.*, 131 N. C. 476; *East St. L. Ry. Co.* v. *O'Hara*, 150 Ill. 580; *Kansas City R. Co.* v. *Crocker*, 95 Ala. 412; *Thomas* v. *Georgia, etc., R. Co.*, 38 Ga. 222; *New York* v. *Third Ave. Ry. Co.*, 117 N. Y. 404.)

Again, the Act is not complied with merely by having automatic couplers on the engine and cars, that would couple with those of the same kind; it requires such as will couple with those of different kinds; the object was to protect the lives and limbs of employees—to make it unnecessary to go between cars to couple or uncouple; the statute forbids the use of cars "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of cars"; this should be read as if there were a comma after "uncoupled."

Again, it was held below "that as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act." Upon this point it is said, "The presumption is that it was stocked for the return, and as it was not a new car or a car just from the repair shop on its way to its field of labor, it was not an 'empty' as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employees is practically the same; and it cannot be true that on the eastern trip the act would be binding, because the cars were loaded, but would not be binding on the return trip, because the cars are empty," citing *Voelker* v. *Ry. Co.*, 116 Fed. R. 867.

Again, to the argument that the character of the car was local only, and could not be changed until it was actually engaged in interstate movement or being put into a train for such use, it was answered that *Coe* v. *Errol*, 116 U. S. 517, holding that logs cut in New Hampshire, and hauled to a river in order to be transferred to Maine, did not apply, for there is a "distinction between merchandise which may become an article of interstate commerce, or not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states. Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip."

After the decision of the lower court Congress amended the law so as to make it clearly include such cases as this (Mar. 2, 1903, C. 976; 32 Stat. 943). This fact, however, in no way detracts from the real value of the court's decision in this case as an announcement that in law humane principles have place.

LIABILITY OF CHRISTIAN SCIENCE HEALER FOR NEGLIGENCE AND DECEIT.—In the recent case of *Spead* v. *Tomlinson* (N. H. Sup. Court, Oct. 4, 1904), 59 Atl. Rep. 376, an action was brought for damages alleged to have been suffered by the plaintiff at the hands of the defendant, who is a christian science healer. The declaration contained counts in contract, negligence and deceit, but the case as finally decided by the Supreme Court involved only the questions of negligence and deceit. It seems that the plaintiff, who had become

interested in the doctrines of christian science and who had attended meetings at which the defendant had told of wonderful cures performed by him, suffered from an attack of appendicitis; that while so suffering, she visited defendant at his home, informed him of the nature of her trouble and of her dread of a surgical operation; that before becoming interested in christian science she had suffered from the same disease, employed a medical practitioner for several months, and learned in a general way the ordinary treatment by physicians of the difficulty. She employed defendant, who "told her that a surgical operation was not necessary, that she was not to take any medicine, and that he could and would cure her if she continued his treatment. He directed her to read 'Science and Health,' to continue her usual diet of solids, and to take her accustomed exercise. He also read to her extracts from 'Science and Health,' and administered treatment by sitting in front of her in an attitude of prayer." Notwithstanding the treatment of defendant, the plaintiff's condition became more serious, and she finally submitted to a surgical operation by regular physicians and was cured. "There was evidence tending to show that the defendant's treatment was injurious to the plaintiff, and that, if it had been persisted in, a cure would have been impossible." It appeared that the plaintiff knew that the defendant made no claim to medical knowledge in the ordinary sense of the term, and that he relied solely upon the ordinary practices of the christian science healer. But it also appeared "that she employed him because she believed he could cure her, and that her belief was based upon his representations as to the efficacy of his treatment in other cases." At the time of the treatment the defendant was not only the physician but also the pastor of the plaintiff.

The plaintiff's right to recover upon the ground of negligence was denied. The conclusion was based primarily upon the proposition that it was the care, skill and knowledge of the ordinary christian science healer that should be the standard by which the defendant should be judged, and not the care, skill and knowledge of the ordinary physician. There being no evidence that defendant had fallen below that standard in the treatment of the plaintiff, it necessarily followed that the plaintiff could not recover. But was the court correct in its premise? The court relied upon those cases that hold that the treatment of a physician must be tested by the principles of the school to which he belongs, citing among other cases *Patten* v. *Wiggin,* 51 Me. 594, in which it is stated that "if there are distinct and different schools of practice, as allopathic or old school, homœopathic, Thompsonian, hydropathic or water cure, and a physician of one of those schools is called in, his treatment is to be tested by the general doctrines of his school, and not by those of other schools. It is to be presumed that both parties so understand it. The jury are not to judge by determining which school, in their own view, is best." But the application of this doctrine requires some standard by which it can be determined as to what is a school of medicine from the point of view of the law. Can there be said to be a christian science school of medicine within any definition that has received judicial sanction? An answer to the question can probably be found in the case of *Nelson* v. *Harrington,* 72 Wis. 591. Although not a christian science case, the doctrines announced

by the court are certainly applicable to the case under examination. The action was against a spiritualist and clairvoyant physician for damages alleged to have been suffered by the plaintiff through improper diagnosis and treatment by the defendant. It was contended on the part of the defendant that he was employed only as a spiritualist and clairvoyant, and that his diagnosis and treatment were "strictly in accordance with the ordinary and customary practice and system of practice used and employed by spiritualists and clairvoyants in diagnosing, attending and prescribing for diseases and ailments of the human body." The court held that in order that a system of practice may constitute a school of medicine under the rule that a physician is only required to possess such knowledge and to exercise such reasonable care and skill as is usually possessed and exercised by physicians in good standing of the same system or school of practice in a like locality, it must have rules and principles of practice both as to diagnosis and treatment that are generally observed by those following the system. In a word, the court held in effect that a school of medicine, in order to be recognized as such before the law, must have a substantial basis in principle. "The regular physician of any school or system," said the court, "acquires his professional knowledge by the study of the general principles of the science, and applies such knowledge to each particular case as it arises, while the clairvoyant physician may have no such general knowledge, but believes himself especially and effectually educated to treat each particular case as it is presented to him, without reference to any particular school." And again: "The proposition that one holding himself out as a medical practitioner and as competent to treat human maladies, who accepts a person as a patient and treats him for disease, may, because he resorts to some peculiar method of determining the nature of the disease and the remedy therefor, be exonerated from all liability for unskilfulness on his part, no matter how serious the consequences may be, cannot be entertained. The proposition, if accepted as true, would * * * contravene a sound public policy." The judgment for the plaintiff in the court below was affirmed. It goes without saying that the so-called christian science system, notwithstanding the name, has not even the semblance of a scientific basis. It has no recognized foundation in principle. Its practitioners are not only without medical training of any kind, but they regard such training as unnecessary for their calling. They utterly repudiate the use of all material means in the treatment of human ills. But the climax of inconsistency and absurdity is reached in the claim that disease is, in the last analysis, but a creature of the imagination to be exorcised by divine interposition. It perhaps would not be judicial to say that the system, so far as it has to do with the healing of the sick, is a stupendous fraud, but it may certainly be claimed that, from the point of view of the law, as set forth in the above-noted Wisconsin case, it cannot be regarded as constituting a school of medicine.

Ordinarily, if a person employ one whom he knows to be without skill to do work requiring skill, he cannot complain of results. But are there not exceptions to the rule? Does not a sound public policy demand that there should be exceptions, when the health and even the lives of people are

involved? Should the principle be applied, as the New Hampshire court applies it in this case, for the protection of a mere pretender whose practices put in jeopardy all who come under his influence? The answer is apparent. To treat appendicitis, as was done in this case, by sitting before the patient in an attitude of prayer and by reading selections from Mary Baker Eddy's notorious book, would seem to the ordinary mind to be so contrary to common sense and reason as to raise a question of negligence for the consideration of the jury, even though the patient assented to the treatment. Indeed, the court says that such would have been the result had plaintiff been "an infant, non compos or had never assented to christian science treatment." But in this connection the fact is overlooked that the defendant was the pastor as well as the physician of the plaintiff, a relation of trust and dependence that is certainly significant as bearing upon the question of assent.

As already suggested, the declaration contained a count in deceit as well as in negligence. But the trial court refused to allow the plaintiff to go to the jury upon the latter theory as well as upon the former. The Supreme Court declined to sustain exceptions to this ruling, basing its conclusion upon the proposition that there was nothing in the case to show a fraudulent intent upon the part of defendant. "Assuming," said the court, "that the defendant's statement that he could and would cure the plaintiff may be the foundation of an action of deceit, her case fails, for there was no evidence that he made it with a fraudulent intent. Although a jury could find from their knowledge of human affairs, their own experience, and the evidence in the case, that the defendant's statement that he could cure the plaintiff without the aid of any material agency, when he knew she had appendicitis, was untrue, it does not follow that they could infer, from the single fact that they were convinced of its untruth, that the defendant did not believe he could induce God to heal her when he made the statement." Ordinarily in an action in deceit, the plaintiff must prove both a false representation and a fraudulent intent, but in certain cases the fraudulent intent may be found from the fact that the representation is false. This cannot be the case generally when the representation is in the form of an opinion. But when the opinion is given by one who is in a position to speak with authority and is advanced evidently for the purpose of inducing another to act, and particularly when the one advancing the opinion occupies a place of trust or confidence with regard to the other, then the expression of an opinion becomes the representation of a fact and a fraudulent intent may be inferred from the circumstances under which the opinion was given. The case of *Hedin* v. *Minneapolis Medical and Surgical Institute,* 62 Minn. 146, 64 N. W. Rep. 158, is in point. In this case, a physician was held liable in an action of deceit, without direct proof of a fraudulent intent, for inducing a patient to submit to treatment by expressing the positive opinion that he could effect a cure, the opinion being given under circumstances from which a fraudulent intent could be inferred. "Generally speaking," said the court, "the representations must be as to a material fact, susceptible of knowledge; and if they appear to be mere matters of opinion or conjecture, they are not actionable. There are many cases, however, in which even a false assertion of an opinion will amount to a

fraud, the reason being that, under the circumstances, the other party has a right to rely upon what is stated or represented. Thus, the liability may arise where one has or assumes to have knowledge upon a subject of which the other is ignorant, and knowingly makes false statements on which the other relies. Where parties possess special learning or knowledge on the subject with respect to which their opinions are given, such opinions are capable of approximating the truth. And for a false statement of them, when deception is designed and injury has followed from reliance on the opinions, an action will lie. * * * The doctor, especially trained in the art of healing, having superior learning and knowledge, assured plaintiff that he could be restored to health. That the plaintiff believed him is easily imagined; for a much stronger and more learned man would have readily believed the same thing. The doctor, with his skill and ability, should be able to approximate to the truth when giving his opinion as to what can be done with injuries of one year's standing, and he should always be able to speak with certainty before he undertakes to assert positively that a cure can be effected. If he cannot speak with certainty, let him express a doubt. If he speaks without any knowledge of the truth or falsity of a statement that he can cure, and does not believe the statement true, or if he has no knowledge of the truth or falsity of such a statement, but represents it as true of his own knowledge, it is to be inferred that he intended to deceive. The deception being designed in either case, and injury having followed from reliance upon the statements, an action for deceit will lie." It is submitted that the case under examination falls within the principle of the foregoing case. Certainly the christian science healer, particularly when he occupies toward his patient the relation of pastor as well as that of physician, should be held to as strict a rule in regard to the expression of his opinions as is the regular physician.

With all the new and irregular methods of healing that are now bidding for public recognition and support, subjects like the one discussed in this note must frequently challenge the attention of the courts, and it is of the highest importance that a sound public policy should not be overlooked in dealing with such questions. For other notes upon the same subject see 2 MICHIGAN LAW REVIEW, 149, 212, 3 MICHIGAN LAW REVIEW, 141.

IOWA AND THE RULE IN SHELLEY'S CASE.—When Robert Andis in 1862 conveyed certain land to Samuel Andis "during his natural life and then to his heirs," he probably little thought that forty-three years afterwards his conveyance would furnish the occasion for the first positive declaration of an old common law doctrine by the courts of Iowa.

Until the recent decision in the case of *Doyle* v. *Andis*, 102 N. W. Rep. 177, no one has been able to say certainly whether the rule in Shelley's case was, or was not, the law in Iowa; for, as Mr. JUSTICE LADD, speaking for the majority of the court in this case, says: "This court has up to the present time avoided the necessity of saying whether it [the rule] should be recognized as a part of the common law of this state." To be sure, there have been Iowa decisions, as pointed out by Mr. JUSTICE WEAVER in his dis-